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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

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DAVID RARDIN, Warden; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

LEONARD RICK RICARDO, *Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
RENÉ A. CHACÓN*
Supervising Deputy Attorney General
*Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102
Telephone: (415) 703-5957
Fax: (415) 703-1234
Counsel for Petitioners

8711

## QUESTIONS PRESENTED

1. If a prosecutor objects to a black prospective juror because she is reading The Autobiography of Malcolm X during voir dire and is employed as an affirmative action investigator, or because her age and different background make her potentially unsympathetic to a young white female prostitute-victim, do these rationales qualify, as a matter of law, as race-based and violative of the second prong of the *Batson v. Kentucky*, 476 U.S. 79 (1986), test?

2. If a prosecutor offers both race-neutral and race-based reasons for challenging a black prospective juror, has the prosecutor, as a matter of law, violated *Batson*'s second prong?

3. In a post-AEDPA case, did the Ninth Circuit Court of Appeals err under *Purkett v. Elem*, 514 U.S. 765 (1995), by holding a prosecutor acted out of racial bias, as a matter of law, by offering race-based as well as race-neutral reasons for his challenges to black jurors?

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1999

No.

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DAVID RARDIN, Warden; DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

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---

The State of California respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINION OR JUDGMENT BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Ninth Circuit that reversed the judgment of the district court is attached to this petition as Appendix A. The order of the United States District Court for the Northern District of California denying the petition for writ of habeas corpus is unreported and is reproduced and attached to this petition as Appendix B. The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc is reproduced and attached to this petition as Appendix C. The decision of the state court of appeals affirming the underlying life without the possibility of parole judgment is reproduced and attached to this petition as Appendix D.

## STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10(a) and (c). The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 2, 1999. Thereafter, the United States Court of Appeals for the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing en banc on September 13, 1999.

## CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, clause 2, of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Tenth Amendment of the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

28 U.S.C. § 2254(a) (Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105-1106) provides in pertinent part:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the

Constitution or laws or treaties of the United States."

28 U.S.C. § 2254(d) (Antiterrorism and Effective Death Penalty Act of April 24, 1996, Pub. L. No. 104-132, 110 Stat. 1214) provides:

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."

28 U.S.C. § 2254(e)(1) (Antiterrorism and Effective Death Penalty Act of April 24, 1996, Pub. L. No. 104-132, 110 Stat. 1214) provides:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

## STATEMENT OF THE CASE

On August 8, 1990, the San Francisco County District Attorney filed an information which charged respondent Ricardo with murder and being a felon in the possession of a concealable weapon. Cal. Pen. Code §§ 187, 12021(a). With respect to the murder, a special circumstance allegation of a prior murder conviction was alleged. Cal. Pen. Code § 190.2(a)(2). The information also alleged five prior serious felony convictions. Cal. Pen. Code § 667(a). Later, the trial court dismissed the felon in the possession of a weapon count on Ricardo's motion.

On October 28, 1991, the trial court declared a mistrial when the jury deadlocked.

On January 26, 1993, the trial court, presiding over the second trial, denied Ricardo's motion for a mistrial for the prosecutor's alleged group-biased exercise of peremptory challenges.

On February 17, 1993, the jury found Ricardo guilty of first-degree murder. On February 24, 1993, the trial court found true the special circumstance allegation and struck the allegations of five prior serious felony convictions.

On May 14, 1993, the trial court imposed a state prison sentence of life without the possibility of parole.

On August 28, 1995, the California appellate court filed an unpublished opinion affirming the judgment. *See* Appendix D.

On November 30, 1995, the California Supreme Court denied Ricardo's petition for review.

On November 12, 1997, the California Supreme Court denied Ricardo's habeas corpus petition.

On November 25, 1997, Ricardo, with counsel, filed the petition for writ of habeas corpus in the district court under 28 U.S.C. § 2254. On August 11, 1998, the district court denied the writ. *See* Appendix B.

Ricardo filed a notice of appeal and application for a certificate of probable cause. The district court interpreted Ricardo's application as one for a certificate of appealability and issued the certificate of appealability as to Ricardo's *Batson v. Kentucky*, 476 U.S. 79 (1986), claim.

On August 2, 1999, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed, finding a *Batson* violation, and ordered the district court to conditionally issue the writ unless the State of California retried Ricardo within 120 days. *See* Appendix A, Majority Decision.

On September 13, 1999, the Ninth Circuit Court of Appeals denied the State's petition for rehearing and rejected the suggestion for rehearing en banc.

On October 4, 1999, the Ninth Circuit Court of Appeals ordered mandate stayed until October 21, 1999, pending the filing of the instant petition for writ of certiorari.

## SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals overturned the judgment of conviction in this murder case on its erroneous understanding of *Batson*. A writ of certiorari should issue for the following compelling reasons.

Federal Courts of Appeal disagree on an issue California asks the Court to resolve: whether as a matter of law a prosecutor violates *Batson*'s second prong where a prosecutor offers both race-neutral and race-based reasons for exercising peremptory challenges. Because uniformity among federal courts is important on questions of this order, California seeks certiorari to resolve this division of authority.

The Ninth Circuit Court of Appeals' resolution of this important issue under *Batson* has not been but should be settled by this Court. Moreover, the Ninth Circuit Court of Appeals opinion conflicts with *Purkett v. Elem*, 514 U.S. 765 (1995).

## ARGUMENT

### THE NINTH CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT OF THE DISTRICT COURT BY GIVING NO DEFERENCE TO THE STATE TRIAL COURT'S CREDIBILITY DETERMINATION

"In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are not 'fairly supported by the record.'" *Purkett v. Elem*, 514 U.S. 765, 769, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995) (per curiam) (quoting former 28 U.S.C. § 2254(d)); *Hernandez v. New York*, 500 U.S. 352, 364-65, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991) (plurality).

A prosecutor's racially discriminatory use of peremptory challenges constitutes a violation of the Equal Protection Clause. *See Batson*, 476 U.S. at 96. A challenge to the removal of a potential juror under *Batson* involves a three-part test: (1) the defendant must allege a prima facie case of purposeful discrimination on the part of the prosecutor, (2) the prosecutor must offer a race-neutral explanation for his or her peremptory challenge, and (3) the trial court must determine if the defendant has made out a case of purposeful discrimination considering the circumstances and the credibility of the prosecutor's reasons. *Id.* at 96-98.

Under *Batson*, once the defense makes a prima facie showing of racial discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for the peremptory challenge. *See Batson*, 476 U.S. at 96-97. The prosecutor's reasons must be facially nondiscriminatory, but need not be "persuasive or even plausible." *Purkett*,

115 S. Ct. at 1771. If the prosecutor offers a race-neutral explanation, the defendant must establish purposeful discrimination. *See id.* at 1770-71. It is only at this third step that the persuasiveness of the prosecutor's explanation becomes relevant. *See id.* Factual determinations concerning discriminatory intent made after a hearing on the merits are entitled to a presumption of correctness if fairly supported by the record considered as a whole. *See Batson*, 476 U.S. at 98 n.21 (trial court's findings on discriminatory intent rest on credibility evaluation and are entitled to "great deference"); *Hernandez v. New York*, 500 U.S. at 364 (like other areas of equal protection law, *Batson*'s treatment of intent to discriminate is a "pure issue of fact" subject to deferential review) (Kennedy, J., plurality); *id.* at 372 (agreeing with plurality that findings as to discriminatory intent are reviewed for clear error) (O'Connor, J., concurring); *Purkett v. Elem*, 514 U.S. at 769 (court's finding on discriminatory intent is a question of fact "which turn[s] primarily on an assessment of credibility"); *Jones v. Gomez*, 66 F.3d 199, 201 (9th Cir. 1995), *cert. denied*, 517 U.S. 1143 (1996) (accord, citing *Elem*); *United States v. Lewis*, 837 F.2d 415, 417 (9th Cir. 1988), *cert. denied*, 488 U.S. 923 (1988) (trial court's finding on discriminatory intent rests on credibility determination and entitled to deference).

Thus, federal habeas review of a state conviction requires a reviewing federal court to accord a presumption of correctness to the state court's factual findings, and demands that the presumption be rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

As the dissenting opinion of Judge Fernandez suggests, the majority opinion pays lip service to the relevant new statute (28 U.S.C. § 2254(e)(1)) and controlling authority from this Court, yet accords no deference to the state trial court's step three credibility determination. *See* Appendix A, dissent of Judge

Fernandez. Instead, the majority opinion runs afoul of *Purkett v. Elem*, in its haste to find, as a matter of law, the challenges to black jurors were for improper reasons. In reality, those reasons are reasonably viewed as race-neutral. The resultant broad ruling of the divided Court of Appeals panel on novel *Batson* questions justifies a grant of the writ of certiorari.

## A. Factual Background

The state record shows that the prosecutor exercised his second peremptory challenge to prospective juror Ms. Donna Jones-Dulin *See* RT at 233.[1] During voir dire, prospective juror Jones-Dulin volunteered that her car was rammed by teenagers in a stolen vehicle and that a cousin was a Chicago police officer. RT at 172, 174. She stated that she was married with a 17-year-old son and a 10-year-old son. RT at 193. Her husband worked as a senior systems engineer, and she was employed as an affirmative action administrator for the County of San Mateo. RT at 193.

The prosecutor asked Ms. Jones-Dulin whether contact with the San Francisco Police Department following the hit and run left any lingering biases, to which she replied, "Uh-uh." RT at 220. When asked to detail her job functions, Ms. Jones-Dulin replied, "I do the investigations and make recommendations . . . to the departments." RT at 221. Ms. Jones-Dulin agreed that she is an "investigator" whose job function demands at times deciding who is or is not truthful. RT at 221. Ms. Jones-Dulin stated there is no reason why she could not be a fair juror. RT at 221.

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1. "RT" hereinafter refers to the Reporter's Transcript of the state voir dire proceedings lodged with the district court as Exhibit L in Support of the Answer.

When the prosecutor exercised his fifth peremptory challenge to prospective juror Ms. Jean Jones, an unreported sidebar conference ensued. RT at 293. Prospective juror Ms. Jones volunteered that she had previously served as a juror in a murder case two and a half years before. RT at 150-51. Ms. Jones stated that the jury had reached a verdict. RT at 151. She described the case as follows: "I think it had to do with somebody in the projects--it was to do with dope or prostitution." RT at 151. She also served as a juror in a civil case six years prior and that jury reached a verdict. RT at 154-55. That case involved an employee suing an employer for an on-the-job accident. RT at 154. Ms. Jones was employed at a hospital as a medical hematologist. RT at 180, 190. Her husband worked as a child welfare worker and her children were aged 27, 24, and 20. RT at 190. She indicated to defense counsel that if the jury were divided 11 to 1, she would not change her vote just to make a unanimous verdict, that she could argue her position despite the number of people against her. RT at 210.

The prosecutor asked Ms. Jones whether he was the prosecutor of the murder trial she last sat on. RT at 225. Ms. Jones replied "no," and shook her head when asked if she remembered the prosecutor's name. RT at 225. When asked if the jury got along well, she replied: "It was tough. I was the foreman on that jury. It was tough, but we did reach a verdict." RT at 225. Ms. Jones reported that trial took a month and deliberations four days. RT at 225. Ms. Jones replied "no" to the questions whether anything about the last murder trial would influence her in the current one, and whether another two-and-a-half week homicide trial would cause her problems. RT at 226. Ms. Jones replied "yes" to the questions whether she could be fair, and whether the last verdict was fair. RT at 226. As the parties were exercising their peremptory challenges, the prosecutor passed three times while Ms. Jones was seated on the jury.

RT at 232-34. After thirteen more prospective jurors were called and examined on voir dire, and one was excused for cause, the prosecutor exercised a peremptory challenge to excuse Ms. Jones. RT at 235, 293.

When the prosecutor exercised his seventh peremptory challenge to prospective juror Alicia Shepard, defense counsel objected. RT at 294.

After defense counsel exercised thirteen of twenty peremptory challenges and the prosecutor seven of twenty, the parties declared the jury panel acceptable. RT at 296. Before the panel was sworn, the trial court continued proceedings outside of the presence of the venire, summarized that counsel had timely objected on *Wheeler*[2] grounds, and found a prima facie case was made upon the exclusion of prospective juror Ms. Jones. RT at 297-98. The trial court stated that it was not clear that prosecutive juror Ms. Alicia Shepard was African-American or mulatto or Puerto Rican. RT at 297. The prosecutor argued Ms. Shepard was not African-American but perhaps Filipino or Latina. RT at 299. The trial court later held that the defense had failed to establish that prospective juror Ms. Shepard was a member of a cognizable group. RT at 333. On direct appeal, Ricardo failed to challenge the trial court's factual finding that prospective juror Ms. Shepard was not a member of a cognizable group, and again failed to challenge that factual finding in the district court.

After the prosecutor explained his reasons for exercising peremptories on prospective jurors Ms. Jones-Dulin and Ms. Jones, the parties argued the matter, the trial court took the matter under submission and the

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2. *People* v. *Wheeler*, 22 Cal.3d 258, 277, 148 Cal. Rptr. 890 (1978) ("[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 13, of the California Constitution.").

following morning found no systematic exclusion. The relevant colloquy follows:

> "MR. GIANNINI [THE PROSECUTOR]: The first challenge, Ms. Jones-Dulin was a black woman who was reading during the voir dire. She was an affirmative action investigator for the county of San Mateo. What she was reading was The Autobiography of Malcolm X.[3] I read it myself, it's an excellent and interesting book, but this case may have racial overtones. I was concerned she would [*sic*] analyzing the case based or [*sic*] race, and I was particularly concerned that she seemed more interested in reading than she did listening to the Court. Under those circumstances I thought it appropriate to excuse her.
>
> "The other, Ms. Jones, my second challenge of an African American woman, was more difficult. She seemed a very strong juror. She had been the foreperson of a jury before at some time in the past, and from her description of the jury experience, she had been something of a force in reaching a verdict.
>
> "Unfortunately, although I polled the other homicide prosecutors in my office, I couldn't find which way the case had gone.
>
> "I would describe her age as perhaps early to mid-50s. The victim in this case is a young white woman whose lifestyle was that of a prostitute. Many of the witnesses in my case are young women who have been involved in prostitution and drugs.
>
> "What I feared was that she would be out of sympathy with the victim's lifestyle and the

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3. *See* A. Haley & Malcolm X, The Autobiography of Malcolm X (1964).

witnesses' lifestyle. And I also felt very strongly that whatever way she went she was not going to be swayed by the other jurors.

"I felt if I had left her on--I passed several times trying to find out which way she had gone on the earlier case. But looking at the jurors available to me in the back and the other jurors on the panel, I felt like I was taking a chance if I left her there that the whole case might be resolved based on her perception of the thing, and I didn't want to take that chance. I felt there were other jurors who would be more sympathetic to the victim and my witnesses.

"I don't think personally Ms. Shepard is an African American woman. I defer to other folks, but she looks to me to be perhaps Filipino or Latino. But in any event it was her age and her background, and I felt she might be out of sympathy with the victim's lifestyle.

"The Court has heard this case once and knows my witnesses are not classic examples of upstanding citizens, and for that reason she was excused.

"It's also interesting to note that counsel has excused two older women from the jury that I would have left on.

"Ms. Tenney who raised her two nephews after her sister apparently abandoned them. I thought she might have been able to view my victim's life with more sympathy, certainly not condoning it but understanding that people do irresponsible things but don't deserve necessarily to be killed.

"The other older woman I would have left is Ms. Costello whose family was involved with police. And I don't blame counsel for letting her go, but those are the sorts of things I have been

looking for to counterbalance what I feared might be disapproval for the victim's lifestyle. And based on that I exercised the three challenges that counsel complains of.

"THE COURT: Response.

"MR. MARTIN [DEFENSE COUNSEL]: Your Honor, the record should reflect that the District Attorney used but 7 challenges of the 20 he had available. There were two -- there are still two jurors, prospective jurors numbers 23 and 24 that remain, both of whom are not young women.

"Mr. Giannini would have replaced someone else on the jury, exercising challenges to some of the male members in order to preserve the racial integrity or at least some semblance of racial cross-section in this jury.

"I believe that his allegations regarding Ms. Jones as opposed to Ms. Jones-Dulin are quite subjective. The record does not demonstrate anything from her responses from which you could objectively draw the conclusions that he did.

"There are a number of other people on the jury who have served on juries in the past, all of which reached verdicts.

"Mr. Giannini informed the Court that he had no idea which way Ms. Jones had voted in her previous service as a juror. She was a strong African-American woman with prior jury service. And other than the fact that she was a strong African-American woman, there was nothing that distinguished her from any of the other jurors who had previous jury duty.

"Her age doesn't distinguish her from many of the other jurors, including the two prospective jurors coming up as I previously mentioned.

And many of the men on the panel are in that same age bracket. And so I don't believe that Mr. Giannini's responses are sufficient to set aside the prima facie finding of a discriminate use of the peremptory challenge, and I would ask the Court to discharge this panel, cite Mr. Giannini for misconduct and declare a mistrial.

"THE COURT: Reply.

"MR. GIANNINI: There are, I believe, remaining two women on the jury both of whom are younger than the women I challenged, Ms. Hillson and Ms. MacLeod.

"Submitted.

"I'm sorry, one further comment. The two women that remain seated in the courtroom but not on the jury; they were never seated in the jury box. I never had a chance to challenge them. I can't see what logically that has to do with anything except that they were there.

"THE COURT: Again, your stated reason for challenging Ms. Jones, Ms. Jean Jones was what?

"MR. GIANNINI: From the tenor of her responses and her presence. First of all, she was on a jury; she was the foreperson of that jury; she said it was a difficult process. She said the trial lasted, I think she said, a month and deliberated four days. I felt she was instrumental in reaching that verdict.

"I was unable to find out what had happened in that jury. If the woman had been 25 years old or if I [*sic*] known which jury she had sat on, she might well have remained. But she was sufficiently strong in her responses and obviously had been strong in one jury, and because of her age I thought she was disapproving of the lifestyle of the victim or she

might be. I may have shot myself in the foot, but the fact is given the other people who were available, I saw no reason to take a chance with her.

"MR. MARTIN: Might I just state that the defense does not exhaust its peremptory challenges, number one, because an unlimited number of challenges given to the defense would not replace the jurors that have been discriminatorily challenged by Mr. Giannini and, number two, that the upcoming jurors, Ms. Kitagawa and Ms. Schoenstein, the defense had agreed that those two jurors would be subject to challenge. We were not satisfied that either of them would be supportive of the defense position in the case such that we would like them to be on this jury, and we were unaware of the identity of anybody else that may replace those jurors as we were down to our last two prospective jurors that had been identified and examined.

"And further at the time that we passed, the prosecution had seven challenges made, and therefore regardless of whether the defense may have been able to exercise some challenge as to these unknown jurors, the prosecution would have been able to excuse all the favorable jurors.

"THE COURT: At this point I would like the opportunity to read the case law overnight and make a decision in the morning. Why don't we meet at 9:30. . . . . .

"THE COURT: On the record in the matter of the People versus Ricardo. The record will reflect that Mr. Martin and Mr. Giannini are both present. The potential jury is outside waiting. Mr. Ricardo is also present.

"At the conclusion of yesterday's session, Mr. Martin made a timely Wheeler motion challenging the exclusion of the Afro-American jurors, all women.

"The Court having found a prima facie case established, requested an explanation from Mr. Giannini which was given.

"Let me set a picture of what this jury looks like at this time. Of the present people in the jury box, 10 of the 12 are men. The 2 remaining jurors who were voir dired but not selected, since no one else was knocked off, are an elderly Asian female, Ms. Kitagawa, and an older white female, Mr. [*sic*] Schoenstein.

"The District Attorney exercised seven challenges in this case, knocking off Mr. Ward as his first challenge, then knocking off Ms. Jones-Dulin, a black female probably in her 40s. Then Mr. Horita, an Asian male, and Ms. Early an older white female, and Ms. Jones, an older black female, and, Mr. Schummel, a older white male, and Ms. Shepard, an older woman of what I would call some mulatto parentage. It's not clear to me whether she's Filipino, Asian, black. It's a little hard to tell on her.

"The explanation given for Ms. Dulin-Jones [*sic*] was that she was reading during the voir dire <u>The Autobiography of Malcolm X</u>. Her affirmative action background made Mr. Giannini nervous that she had -- and and there are racial overtones in this case. Mr. Giannini's feelings were expressed that he felt that it might be a factor with her, but in any event he was upset about her reading.

"Ms. Jones, who was a foreperson of a murder case about two years ago that went for about a month, four days of deliberation in

which she was the foreperson and in which she indicated the deliberations were difficult. I'm not sure those are the exact words, but that's the impression. She is in her early to mid-50's, I would say, and Mr. Giannini's expressed reasons why that he felt that she was a forceful juror and would not be swayed by anyone else and would carry the jury with her to whatever end she wanted them to go. He was concerned about her age as indicating disapproval of a lifestyle of the victim and some of the witnesses in this case.

"And Ms. Shepard, again I'm not clear whether she really was excluded -- whether she fits in our category of the group here because it's not clear what her parentage is whether she would identify with the Afro-American culture, the Filipino culture or the Latino culture. She is about the same, maybe a little younger than Ms. Jones but older than Ms. Jones-Dulin. And again there was concern here because of age there would be a disapproval of the lifestyle of the victim and others.

"The other older females who were available on the jury, Mr. [*sic*] Tenney and Ms. Costello, Mr. Giannini indicated he did not challenge Ms. Tenney since she raised her stepchildren. That led him to believe that she might be more tolerant of these younger people or words to that effect. And Ms. Costello was challenged because of her law and order background in terms of her relatives. They were challenged by the defense, but that's not an issue in this case at all.

"The law requires that if there is a cognizable group that's being excluded in this case it would be Afro-American and in this case female because that's all we're dealing with.

> And if there's a strong likelihood that the jurors are being excluded based on that, then the Court must demand an explanation by finding a prima facie case, which I've done.
>
> "Mr. Giannini's response was to articulate a neutral explanation for striking these particular jurors, in this case both Ms. Jones and possibly Shepard. The explanation as to Ms. Jones-Dulin regarding the reading during voir dire is probably a sufficient explanation on that one. His concern was that she would not necessarily pay attention in this case.
>
> "And with respect to Ms. Jones, this obviously is the more difficult one. Ms. Jones was stricken because she is a forceful person. Given her past experience on a jury and because of her age, she's likely to disapprove of the lifestyle. I think that's what these challenges boil down to.
>
> "Mr. Giannini did challenge Ms. Early who was also an older female. In fact, three of his four challenge [*sic*] to women, one basis is age.
>
> "At this point I cannot find that Mr. Giannini acted in bad faith within the meaning of Wheeler.
>
> "With Ms. Shepard, she is also an older person and again her -- I'm not convinced that she belongs in this cognizable group. It would have been helpful if someone had asked her that, but it's not clear from her appearance of where exactly she belongs in the spectrum, so I cannot consider that as a basis."

RT at 298-03, 330-33.

Thereafter, the trial court allowed defense counsel to pass on the prospective jury panel once more or exercise his remaining seven peremptories. RT at 335-41. Defense counsel exercised no further peremptories

and passed on the jury panel. RT at 341. Voir dire thereafter continued until four alternates were chosen.

**B. If A Prosecutor Objects To A Black Prospective Juror Because She Is Reading The Autobiography Of Malcolm X During Voir Dire And Is Employed As An Affirmative Action Investigator, Or Because Her Age And Different Background Make Her Potentially Unsympathetic To A Young Female Prostitute-Victim, Do These Rationales Qualify, As A Matter Of Law, As Race-Based And Violative of *Batson*'s Second Prong?**

The majority decision holds that if a prosecutor objects to a black female juror because she is reading The Autobiography of Malcolm X and is an affirmative action investigator, or because her age and different background make her potentially unsympathetic to a young white female prostitute-victim, those reasons are race-based explanations as a matter of law. No court has previously so held and this Court should accordingly consider the propriety of such a broad holding. The Ninth Circuit incorrectly held that the prosecutor's use of a peremptory challenge based on a well grounded concern that one juror might analyze the evidence in racial terms is equivalent to striking the juror based on her race. The assumption that race and an opinion on race are inseparable is antithetical to the very type of racial stereotyping that *Batson* forbids. *See United States v. Payne*, 962 F.2d 1228, 1233 (6th Cir.), *cert. denied*, 506 U.S. 909, *and cert. denied*, 506 U.S. 1033 (1992) (explanation that the government struck two black jurors because they strongly favored civil rights accepted where one defendant was trying to inject the issue of racial discrimination into the trial). Moreover, the record does not support the majority decision. *See* Appendix A,

dissent of Judge Fernandez; *see also* Appendices B & D. All explanations offered by the prosecutor were race-neutral because they plainly related to the particular challenged jurors' attitude toward the case as perceived by that prosecutor.

### C. If A Prosecutor Offers Both Race-Neutral And Race-Based Reasons For Challenging A Black Prospective Juror, Has The Prosecutor, As A Matter Of Law, Violated *Batson*'s Second Prong?

The majority decision holds that if a prosecutor offers both race-neutral and race-based reasons for challenging a juror, the prosecutor has not, as a matter of law, satisfied *Batson*'s second prong. This Court has not previously so held. As such, the standard for granting the writ was not met. *See* 28 U.S.C. § 2254(d). Moreover, such a holding conflicts with decisions from other circuits. *See Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993) (holding that peremptory jury strikes motivated only in part by race do not violate the Equal Protection Clause if the prosecutor can sustain the burden of showing he would have exercised his peremptory challenge for race-neutral reasons as well); *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) (accord); *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir.), *cert. denied*, 517 U.S. 1149 (1996) (dual motivation analysis determines whether a strike exercised for both racial and race-neutral reasons violates *Batson*); *Wallace v. Morrison*, 87 F.3d 1271, 1274 (11th Cir.), *cert. denied*, 117 S. Ct. 616 (1996) (accord); *contra Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205, 210 (S.C. 1998) (dual motivation analysis rejected); *see also Johnson v. Vasquez*, 3 F.3d 1327, 1332 (9th Cir. 1993) (dissent of Thompson, J.). Accordingly, the Court should consider the propriety of the underlying broad ruling on which federal courts of appeal and state courts disagree.

**D. In A Post-AEDPA Case, Did The Ninth Circuit Court Of Appeals Err Under *Purkett v. Elem*, 514 U.S. 765 (1995), By Holding A Prosecutor Acted Out Of Racial Bias, As A Matter Of Law, By Offering Race-Based As Well As Race-Neutral Reasons For His Challenges To Black Jurors?**

In *Purkett v. Elem*, 514 U.S. 765, the Court made clear that the prosecution is not required to put forth race-neutral reasons that are "persuasive, or even plausible." *Id.* at 768. Instead, the explanations must simply be nondiscriminatory. *Id.* The *Elem* court distinguished between impermissibly discounting the prosecutor's reasons as "silly or superstitious" at stage two of the *Batson* inquiry and determining at stage three whether the defendant has carried the burden of proving purposeful discrimination in light of the stated reasons, which the trial court may choose to disbelieve. *Id.* at 768-69. *Elem* also confirmed that the trial court's finding at the third step of the *Batson* analysis, the ultimate determination of whether the prosecutor acted with discriminatory intent, is a question of fact "which turn[s] primarily on an assessment of credibility." *Id.* at 769.

The Ninth Circuit's decision runs afoul of *Elem* precisely because it found a prong two violation based on a prong three finding that the explanation was not credible without reviewing the credibility determination made by the state trial court or giving any deference to that determination. *See Elem*, 514 U.S., at 768 ("The Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i.e.*, a 'plausible' basis for believing that 'the person's ability to perform his or her duties as a juror' will be affected. 25 F.3d, at 683. It is not until the *third* step that the persuasiveness of the

justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Batson*, *supra*, at 98; *Hernandez*, *supra*, at 359 (plurality opinion). At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.").

Instead, the instant majority holds that as a matter of law the prosecutor's explanations proved a *Batson* prong two violation. That holding is wholly inconsistent with *Elem*. *See Elem*, 514 U.S., at 768; *see also Elem*, 514 U.S., at 777 (dissent of Stevens, J.) ("I would adhere to the *Batson* rule that such an explanation does not satisfy step two. Alternatively, I would hold that, in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court's unnecessary tolerance of silly, fantastic, and implausible explanations . . . demeans the importance of the values vindicated by our decision in *Batson*.").

Accordingly, the majority decision conflicts with *Elem*, and offers no explanation for failing to reach *Batson*'s third prong. No state court ascribed a discriminatory intent to the prosecutor from his statements justifying his challenges of the jurors. The Ninth Circuit fails to further explain how it is able to divine such a discriminatory intent. The majority's conclusion on discriminatory intent is inconsistent with the presumption of correctness required by the AEDPA. *See* U.S.C. § 2254(e)(1).

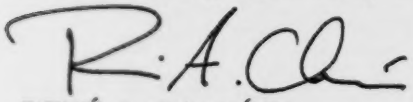
## CONCLUSION

Accordingly, we respectfully ask that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: October 12, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General



RENÉ A. CHACÓN*
Supervising Deputy Attorney General
*Counsel of Record

Counsel for Petitioners

SF1998FA0047

# APPENDIX A

NOT FOR PUBLICATION

FILED
AUG 02 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| **LEONARD RICK RICARDO** | ) |
| | )**No. 98-17091** |
| **Petitioner-Appellant,** | ) |
| | )**D.C. No. CV-97-04302-SI** |
| **v.** | ) |
| | ) **MEMORANDUM**[1] |
| **DAVID RARDIN, Warden, USP Lompoc; DANIEL E. LUNGREN, Attorney General,** | ) |
| **Respondents-Appellees.** | ) |

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted July 14, 1999
San Francisco, California

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Before: CHOY, FERNANDEZ and THOMAS,
Circuit Judges

Leonard Rick Ricardo challenges the district court's denial of his petition for a writ of habeas corpus. During voir dire in his state court trial, he alleged that the prosecutor removed two black jurors for unconstitutional reasons. He challenged their removal during the voir dire, but the state court denied the motion. He was thereafter convicted of first degree murder. He challenged the removal of the two jurors up through the California courts and ultimately filed a petition in the U.S. District Court for the Northern District of California. The district court denied the petition, but granted a certificate of appealability permitting Ricardo to appeal the decision to this court. Because the parties are familiar with the factual and procedural history of the case, we will not recount it here.

Ricardo's petition is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir.) (en banc), *cert. denied*, 118 S. Ct. 586 (1997). Under AEDPA, we only may grant habeas relief if the state court's decision was "contrary to, or involved an unreasonable application of, federal law as established by the Supreme Court," 28 U.S.C. § 2254(d)(1), or if the adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, *see id.* § 2254(d)(2). "[A] state court factual determination is unreasonable if it is so clearly incorrect that it would not be debatable among reasonable jurists." *See Jeffries*, 114 F.3d at 1500 (citations and internal quotation marks omitted). "As to more debatable factual determinations, the care with which the state court considered the subject may be important." *Id.* Finally, AEDPA directs that fact findings of the state court be

granted a presumption of correctness that can only be rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Tolbert v. Page*, No. 97-55004, 1999 WL 427449, at *6 (9th Cir. June 28, 1999) (en banc).

We hold that even under AEDPA's deferential review, Ricardo has established a *Batson* violation. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). A challenge to the removal of a potential juror under *Batson* involves a three-part test: (1) the defendant must allege a prima facie case of purposeful discrimination on the part of the prosecutor, (2) the prosecutor must offer a race-neutral explanation for his or her peremptory challenge, and (3) the trial court must determine if the defendant has made out a case of purposeful discrimination considering the circumstances and the credibility of the prosecutor's reasons. *See id.* at 96-98.

The trial court appropriately held that the defendant had established a prima facie case of purposeful discrimination. Indeed, all African-American jurors had been peremptorily struck by the prosecution. Thus, the burden then shifted to the prosecution to provide a race-neutral rationale for the peremptory challenges.

Whether an explanation is a facially race-neutral explanation sufficient to satisfy the second prong is a question of law. *See Hernandez v. New York*, 500 U.S. 352, 360 (1991); *Tolbert*, 1999 WL 427449, at *2 n.5; *United States v. McCoy*, 23 F.3d 216, 217 (9th Cir. 1994). The ultimate resolution, however, of whether a prosecutor acted with discriminatory purpose in removing a juror is a factual determination that relies mainly on credibility findings. *See Batson*, 476 U.S. at 98 n.21.

Neither explanation given by the prosecutor was race neutral as a matter of law. Indeed, both explanations contained racial references. In his explanation for his removal of Jones-Dulin, he expressed concern that this "black woman" would analyze the case which, in his words, contained "racial overtones," based on race. He noted with disapproval that he had observed her reading *The Autobiography of Malcolm X*, and expressed displeasure that she worked as an affirmative action administrator. *Batson* made clear that a prosecutor cannot exercise peremptories on the assumption that black jurors would be unable impartially to consider the State's case against a black defendant. *See* 476 U.S. at 89. Although the prosecutor also noted that Jones-Dulin had been reading during voir dire, the thrust of his remarks indicated that his primary rationale was founded primarily on racial concerns.

The prosecutor also offered an explanation of why he removed Jones from the jury. He explained that he was concerned with the fact that she had been the foreperson in another murder case and that she had been "a force in reaching the verdict." He also was concerned with her age, which he estimated to be mid-50s, because the victim was a young woman who was a prostitute. He articulated his belief, however, that Jones would not sympathize with the victim because the victim was "a young *white* woman." In *Batson*, the Court stated that a black juror cannot be removed on the assumption that (s)he will be biased in favor of a black defendant. *See* 476 U.S. at 89. This is identical to the assumption here: that a black juror will be biased against a white victim. Both explanations rely exclusively on assumptions based on race. Therefore, the reference to the whiteness of the victim taints the other reasons and renders the explanation race based. The other factor mentioned by the prosecutor, Jones's age, does not remove the taint of the race-based reason.

The California court of appeals, in assessing Ricardo's case, believed that the second prong of *Batson* was satisfied because in each case the prosecutor offered *a* genuine, nondiscriminatory reason. Such an application of *Batson* is unreasonable as the explanations offered in support of the prosecutor's removal of Jones-Dulin and Jones were so tainted by racial references that the explanations were not race-neutral as a matter of law. To allow the application of *Batson* utilized by the California state court would largely nullify the protections of *Batson*, which explicitly requires the prosecutor to not remove jurors on account of their race or assumptions about their biases stemming from their race.

Because a *Batson* violation is cause for automatic reversal, we do not apply harmless error. *See Batson*, 476 U.S. at 100; *Turner v. Marshall*, 121 F.3d 1248, 1254 n.3 (9th Cir. 1997) (as amended). Instead, we reverse the denial of the writ and instruct the district court to conditionally grant the writ unless the State of California retries Ricardo within 120 days.

**REVERSED AND REMANDED.**

*Ricardo v. Rardin*, No. 98-17091

**FERNANDEZ**, Circuit Judge, Dissenting

F I L E D
AUG 02 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In my view, while the majority does articulate the high standard of deference we owe to the California courts, it does not, in fact, grant sufficient deference to them. Of course, the view taken by the majority is one way to read the record.

Another way is that in the one instance the prosecutor was concerned that the *particular* black woman's background and lack of interest in following the proceedings might make her approach the case in an inappropriate manner. As to the other instance, the prosecutor was concerned that the *particular* black woman would be a very strong juror, who might pull the jury, and he did not want to run the risk that at her age she would be unsympathetic to the victim. Even then he was not sure. Because he could not get further information on her, he decided not to take a chance but, as he explained, still feared that by removing her he might have shot himself in the foot.

The trial judge, the California Court of Appeal, and the district court essentially read the record the second way. I cannot say that was unreasonable.

Thus, I respectfully dissent.

# APPENDIX B

FILED
AUG 11 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| **LEONARD RICARDO,** | **No. C 97-4302 SI** |
| **Petitioner,** | **ORDER DENYING PETITION FOR WRIT** |
| **v.** | **OF HABEAS CORPUS** |
| **DAVID RARDIN, Warden, et al.,** | **ENTERED IN CIVIL DOCKET AUG 13, 1998** |
| **Respondents.** | |

On August 5, 1998, the Court heard argument on Leonard Ricardo's petition for a writ of habeas corpus. Having carefully considered the moving and opposing paper, including the records submitted concerning the proceedings in state court, and the arguments of counsel, and for the reasons set out below, the petition is denied.

**BACKGROUND**

On February 17, 1993, a San Francisco County jury found petitioner Leonard Ricardo guilty of the first

degree murder of Angela Noe.[1] The trial court found that a "special circumstance" alleged in the murder count -- that petitioner had a prior murder conviction -- was true. On May 14, 1993, the trial court imposed a state prison sentence of life without the possibility of parole.[2]

Petitioner appealed his conviction to the state Court of Appeal. He challenged the admission of evidence of prior bad acts, the prosecutor's conduct both during a witness's testimony and during closing argument, and the trial court's refusal to strike the special circumstance.

Petitioner also appealed the trial court's refusal to grant a motion he brought after jury selection under *People* v. *Wheeler*, 22 Cal.3d 258 (1978).[3] Petitioner, who is African-American, had argued to the trial court that the prosecutor's use of peremptory challenges to excuse two African-American female jurors and a woman "who appeared to have some African-American blood" violated the California and United States Constitutions. After the prosecutor's peremptory challenges, no African-American jurors remained.

The Court of Appeal affirmed petitioner's conviction on August 28, 1995. The Court specifically found that each of the two peremptory challenges appealed was "supported by substantial evidence of at

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1. A previous jury could not reach a verdict, forcing the trial court to declare a mistrial.

2. Plaintiff's sentence was ordered to run consecutive to a federal sentence he was currently serving.

3. *Wheeler* holds that "[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 13, of the California Constitution." 22 Cal.3d at 277. The United States Supreme Court reached the same conclusion under the Equal Protection Clause of the 14th Amendment in *Batson v. Kentucky*, 476 U.S. 79 (1986).

least one race-neutral explanation."[4] Petitioner then filed a petition for review with the California Supreme Court, appealing the *Wheeler/Batson* issue only. The Supreme Court denied the petition on November 30, 1995.

Petitioner then filed a request for a writ of habeas corpus with the California Supreme Court. That request was also denied.

The present petition for a writ of habeas corpus was filed on November 25, 1997.

## LEGAL STANDARDS

### A. Habeas Corpus

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

For habeas purposes, a petitioner serving consecutive sentences is in "custody" for all of the consecutive sentences; thus, he may challenge a conviction underlying the sentence he is currently serving, or a conviction underlying a sentence already served, *Garlotte*

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4. Petitioner did not appeal the prosecutor's challenge of the woman whose race was disputed. *See* Court of Appeal Opinion at 9 n.11.

v. *Fordice*, 115 S. Ct. 1948, 1949-50 (1995), or a conviction underlying a sentence yet to be served, *Peyton v. Rowe*, 391 U.S. 54, 64-65 (1968) (a prisoner is "in custody in violation of the Constitution . . . if any consecutive sentence [the prisoner] is scheduled to serve was imposed as the result of a deprivation of constitutional rights").

**B. Batson**

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In the context of jury selection, the clause "forbids [a] prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

Courts apply a three-step analysis to claims of racial discrimination in the exercise of peremptory challenges:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

*Jones v. Gomez*, 66 F.3d 199, 201 (9th Cir. 1995) (quoting, *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991)).

**DISCUSSION**

The present petition is based on the following facts: the trial court found that petitioner had made a prima facie case of a discriminatory use of peremptory challenges as to two potential jurors -- Ms. Jones-Dulin and Ms. Jones. RT at 297.[5] The trial court then asked the prosecutor to explain his reasoning for those two peremptory challenges.

The prosecutor provided two rationales for his challenge of Ms. Jones-Dulin: (1) a concern that "she would [be] analyzing the case based on race" because she was employed as an affirmative action investigator and was reading *The Autobiography of Malcolm X* during the voir dire;[6] and (2) a concern that "she seemed more interested in reading than she did in listening to the Court." RT at 298.

The peremptory challenge of Ms. Jones, the prosecutor stated, arose from a concern about a combination of two characteristics: (1) what the prosecutor perceived to be Ms. Jones' strong will, based in part on the fact that she had been a foreperson on an earlier jury, and "from her description of the jury experience, she had been something of a force in reaching a verdict"; and (2) Ms. Jones' age (mid-50s), which the prosecutor suggested might make her "out of sympathy" with the victim, "a young white woman whose lifestyle was that of a prostitute . . . involved in prostitution and drugs."

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5. The trial court found that defendant had not made out a prima facie case with respect to the prosecutor's excuse of the third contested juror because petitioner failed to establish that she was a member of a cognizable group. RT at 333. That finding is not challenged here.

6. The prosecutor stated that the case "may have racial overtones," presumably because petitioner is African-American and the victim Angela Noe was white. RT at 298.

The prosecutor stated that he "saw no reason to take a chance with her." RT at 298-299, 302.

The trial court considered the *Wheeler/Batson* question overnight. The court then summarized:

> The explanation as to Ms. Jones-Dulin regarding the reading during voir dire is probably a sufficient explanation on that one. His concern was that she would not necessarily pay attention in this case.
>
> And with respect to Ms. Jones, this obviously is the more difficult one. Ms. Jones was stricken because she is a forceful person. Given her past experience on a jury and because of her age, she's likely to disapprove of the lifestyle. I think that's what these challenges boil down to. . . . At this point, I cannot find that [the prosecutor] acted in bad faith within the meaning of *Wheeler*.

RT at 332-333.

The California Court of Appeal reviewed the same record to determine the propriety of the trial court's finding concerning motivation, first noting that "[t]he trial court must determine whether the prosecutor's explanation is bona fide or a sham, and a reviewing court must give that determination great deference" since "[t]rial judges plainly are better positioned than appellate courts to evaluate the credibility and genuineness of reasons given for peremptory challenges." Respondent's Exhibit E, at 10. The Court of Appeal went on to evaluate in depth the reasons given and the analysis performed, and found that each peremptory challenge was supported by substantial evidence of at least one race-neutral explanation. *Id.*, at 15.

Petitioner now argues that the trial court's finding -- that the prosecutor did not discriminate on the basis of race by exercising peremptory challenges against Ms. Jones-Dulin and Ms. Jones -- should be replaced by this Court's. It is important to note, however, that "the ultimate determination of whether the prosecutor acted with discriminatory intent is a question of fact 'which turn[s] primarily on an assessment of credibility.'" *Jones v. Gomez*, 66 F.3d 199, 201 (9th Cir. 1995) (quoting *Purkett v. Elem*, 514 U.S. 765 (1995)). The parties agree that the applicable standard is that now set out in 28 U.S.C. 2254(d)(2) -- i.e., petitioner must demonstrate that the state court adjudication was based on an unreasonable determination of the facts in light of the evidence presented in the state court.[7] Or, as stated by petitioner at page 4 of his memorandum supporting the traverse, the state trial court's finding that the prosecutor was not motivated by discriminatory intent must be upheld unless it is "not fairly supported by the record," citing *Purkett v. Elem*, *supra*, 514 U.S. at 769.

This Court finds that the state court adjudications of this question were not unreasonable and

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7. The Antiterrorism and Effective Death Penalty of 1996 renumbered and revised 28 U.S.C. § 2254(e)(1), adding the provision that in habeas petitions, determinations of factual issues made by state courts receive a presumption of correctness that can be rebutted only by clear and convincing evidence. Whether the state trial and appellate court conclusions that the prosecutor did not act with discriminatory intent, are themselves "determinations of factual issues" entitled to this presumption and the clear and convincing evidence standard is not clear. Neither party argued this position, but the language in *Jones v. Gomez* cited above -- although written before the enactment of AEDPA -- suggests that these conclusions are "factual issues" and would be subject to § 2254(e)(1) analysis. However, since for the reasons set out below the Court finds that the record reasonably supports the determinations made, this question need not be decided here.

were fairly supported by the evidence presented in the state court.

In reaching its determination that the peremptory challenge to Ms. Jones-Dulin was not in bad faith, the trial court relied on the prosecutor's statement that he felt Ms. Jones-Dulin would not pay attention based on the fact that she was reading a book during voir dire. Petitioner argues that despite this racially-neutral explanation, the prosecutor's mention of *The Autobiography of Malcolm X* and Ms. Jones-Dulin's job as an affirmative action investigator show that the prosecutor excused Ms. Jones-Dulin in violation of *Batson* -- "solely on account of" her race. However, petitioner does not contend that Ms. Jones-Dulin did not read during voir dire -- the fact relied upon by the prosecutor and accepted by the trial court, who was present and watching the proceedings. The trial court accepted the prosecutor's statement that he felt "nervous" about the juror's affirmative action background since there were racial overtones in the case, but that in any event he was upset about her reading and was concerned that she would not necessarily pay attention in this case. In light of the record, this determination was not unreasonable.

Nor was the trial court's determination regarding the peremptory challenge of Ms. Jones unreasonable, in light of the evidence presented. Petitioner argues that the prosecutor's concerns about Ms. Jones' "forcefulness" and the effect such forcefulness would have on the jury were pretexual, and that the prosecutor's stated concerns about Ms. Jones' age were not applied similarly to other potential jurors. However, the trial court's conclusion that Ms. Jones' forcefulness -- related to prior service as foreperson of a month-long murder trial -- was a legitimate concern of the prosecutor was supported by the record, as was the trial court's acceptance of the prosecutor's stated concern that the juror's age suggested

that she might unsympathetic to the victim's and witnesses' drug- and prostitution-related lifestyles.

Petitioner has failed to demonstrate that the trial court's findings were unreasonable, or were "unsupported in the record or refuted by it." *Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1991). Therefore, petitioner's request for a writ of habeas corpus is denied.

## CONCLUSION

For the above reasons, petitioner's request for a writ of habeas corpus is **DENIED**.

Dated: August 7, 1998

SUSAN ILLSTON
United States District Judge

FILED
AUG 11 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| **LEONARD RICARDO,** | ) | **No. C 97-4302 SI** |
| | ) | |
| **Petitioner,** | ) | **JUDGMENT** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **DAVID RARDIN,** | ) | |
| **Warden, et al.,** | ) | |
| | ) | |
| **Respondents.** | ) | |
| | ) | |

In accordance with this Court's Order Denying Petition for Writ of Habeas Corpus dated August 7, 1998, judgment is hereby entered in favor of respondent and against petitioner.

**IT IS SO ADJUDGED.**

Dated: August 7, 1998

SUSAN ILLSTON
United States District Judge

**ENTERED IN CIVIL DOCKET AUG 13 1998**

# APPENDIX C

NOT FOR PUBLICATION

FILED
SEP 13 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| **LEONARD RICK RICARDO** | ) |
| | ) **No. 98-17091** |
| **Petitioner-Appellant,** | ) |
| | ) **D.C.No.CV-97-04302-SI** |
| **v.** | ) |
| | ) **ORDER** |
| **DAVID RARDIN, Warden, USP Lompoc; DANIEL E. LUNGREN, Attorney General,** | ) |
| | ) |
| **Respondents-Appellees.** | ) |

Before: **CHOY, FERNANDEZ** and **THOMAS,** Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

# APPENDIX D

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

F I L E D
AUG 28 1995
Court of Appeal-First App. Dist.
RON D. BARROW, Clerk

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

| | |
|---|---|
| **THE PEOPLE,** | ) **A062248** |
| | ) |
| **Plaintiff and Respondent,** | )**(San Francisco** |
| | )**City and County** |
| **v.** | )**Super. Ct. No.** |
| | )**137093)** |
| **LEONARDO RICARDO,** | ) |
| | ) |
| **Defendant and Appellant.** | ) |
| | ) |

Leonardo Ricardo appeals after a jury conviction of first degree murder (Pen. Code, §§ 187, 189).[1] The trial court found true the special circumstance allegation that appellant had a prior conviction of second degree murder (§ 190.2, subd. (a)(2)). Appellant was sentenced to state prison for life without possibility of parole.

Appellant contends that the trial court (1) erroneously denied his *Wheeler* motion,[2] (2) improperly

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1. Except as otherwise indicated, all further statutory references are to the Penal Code.

2. *People* v. *Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

allowed prior bad acts evidence, (3) should have granted a mistrial because of prosecutorial misconduct, and (4) should have struck the prior murder special circumstance allegation. We find no reversible error and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

On April 27, 1987, at about 6 a.m., Angela Noe's dead body was discovered just off the road near the 17th hole of Lincoln Park Golf Course in San Francisco. She had suffered five gunshot wounds and six stab wounds. Police found under her body the spent casing of a .380 caliber round from an automatic weapon. Nearby, they found a bullet fired from the same gun as a bullet removed from her neck.[3] The chief medical examiner concluded, based on the blood spatters, injuries, and debris on Noe's body and clothing, that she was assaulted and killed where her body was found. The best estimate was that Noe died shortly after midnight on the morning of the day she was found. The chief medical examiner said she appeared to be about 20 years old.

Evelyn Padilla testified that in 1987, she lived with her sister, Jeanne Hunt, and Angela Noe. They shared an apartment on Bellevue Avenue in Oakland. All three were prostitutes and used drugs. Padilla and Hunt were addicted to heroin; Noe used cocaine and alcohol. They bought their drugs from appellant. Padilla spent $100 to $200 a day on heroin. Most of the money she made as a prostitute she paid to appellant for drugs. Hunt too used most of the $70 to $200 she made daily as a prostitute to pay appellant for drugs. Noe usually owed appellant for drugs purchased from him. On the night she

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3. The two recovered bullets' characteristics indicated that the weapon was one of the small Colt .380 caliber automatic pistols available on the market.

was killed, Noe had paid off a $500 drug debt to appellant.

For their business as prostitutes, the three women had an "in and out call service." They placed advertisements in newspapers and shared telephone messages. Noe and Padilla moved into the apartment together in late January or early February of 1987. Hunt moved in a month later, after living with Kevin McNeary. Since childhood, McNeary had been best friends with Carlton "Sporty" Neal, with whom Noe lived before moving in with Padilla. Neal had introduced Noe to Hunt and suggested the two women might work together.

Hunt had lived with appellant before living with McNeary, and after moving in with Noe and Padilla, she resumed her sexual relationship with appellant. While Hunt lived with appellant, he had discussed the money or fees to be paid by women who left relationships with him. She knew that McNeary and appellant had discussions that basically were negotiations. Two months later Hunt left McNeary.

Hunt had trouble getting her belongings and Padilla's furniture from McNeary after she stopped living with him. One witness said that Hunt's "possessions were being held ransom . . . ." At the end of March, Hunt and Padilla went to get their property from McNeary; they were accompanied by appellant, Frederick Henderson, and another person. After Hunt and Padilla made one trip to transport their possessions, they returned and found appellant and Henderson loading McNeary's belongings into appellant's car. As they left, they heard McNeary's voice and heard appellant tell McNeary he would cut out McNeary's heart if he ever bothered Padilla and Hunt again. Appellant kept McNeary's belongings and later told Padilla he had pistol-whipped and "fucked" McNeary.

Not long after the incident with McNeary, appellant and Noe discussed setting up Neal. Noe was

angry with Neal for giving her gonorrhea and wanted to get back at him. Appellant told Noe that she could set up Neal for him and he could get even with Neal also.

Late in the afternoon of April 26, Padilla was reviewing messages on their answering machine when she heard an inadvertently recorded conversation between Noe and Neal. On the tape, Neal told Noe to turn off the answering machine and said, "Well, you know, we don't want anyone to know we're seeing each other." Padilla thought it sounded like something was going to happen; she told appellant he needed to hear the tape. Padilla played the tape for appellant, who appeared to be thinking deeply and said a couple of times, "I'll take care of it."[4]

Frederick Henderson testified that at the end of April, appellant called him to ask for a ride to San Francisco. Appellant asked Henderson if he had a car, and Henderson said he had the station wagon.[5] During 1986 and 1987, Henderson did illegal work involving violence as a "security man" for a friend in the narcotics business. He had been convicted in 1970 of robbery and manslaughter in Detroit and had been convicted in 1984 of narcotics possession in California. In his criminal life, Henderson had accepted contracts to kill people.

Henderson first learned of appellant when he was propositioned to kill appellant. Henderson did not attempt the killing, though, because he was not paid. When Henderson later made appellant's acquaintance, he told appellant about the failed contract to kill him. After that, appellant and Henderson "did a few things together"

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4. Later, Padilla told her sister, Hunt, about the telephone call from Neal and that appellant was upset about it.

5. Appellant had been in Henderson's personal vehicle before and knew it was not a station wagon. The station wagon was a "throw away," a car that was not registered and which, when wiped clean of fingerprints, could be left somewhere and not be traced.

that required Henderson to have a firearm and sometimes involved acts of violence. Henderson helped appellant subdue McNeary and retrieve Hunt's possessions. The McNeary incident was a business matter, for which Henderson armed himself. He said McNeary was tied up, and appellant hit McNeary once with a gun.

When appellant asked for the ride to San Francisco, Henderson went to appellant's house to pick him up. It was after dark. Appellant told Henderson he was going to San Francisco "to put his girl down," which Henderson thought meant she was going to work as a prostitute. Henderson and appellant went to the Bellevue Avenue apartment and picked up Noe. Henderson drove appellant and Noe to San Francisco. Appellant gave Henderson directions to a park near the ocean, where they stopped. Appellant and Noe got out of the car. Henderson heard some scuffling and scrambling and heard Noe say, "Ricky" in a shocked way. Henderson heard some "pops" that he assumed were gunshots. Appellant got back into the car, and Henderson drove off, making a left turn and passing in front of a large, ornate building that had lions in front. On the way back to Oakland, appellant said he "had to lay her down . . . ." As they drove over the Bay Bridge, Henderson saw appellant throw an automatic handgun out the window. The weapon looked like a .380 caliber automatic appellant and Henderson had taken from another person a few weeks earlier.

They drove to appellant's house in Oakland, where appellant lived with Joy Beverly. Beverly testified that appellant woke her up between midnight and 4 a.m. Appellant changed clothes and told Beverly to get rid of the clothes he had been wearing. Appellant kept his shoes, but first removed the shoelaces and added them to the pile of black clothes on the floor.[6] As Beverly put

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6. Appellant also kept the red leather jacket he had been

the clothes in a bag, she noticed they had wet spots; she threw the bag in a dumpster at a supermarket down the street. When she used the bathroom sink after appellant, she noticed a red color that looked like blood. As appellant changed clothes, Beverly heard Henderson say to him, I couldn't believe you did that."[7/] She was preparing food for them when appellant and Henderson left. Appellant said they had to leave so they could follow their alibi. Henderson dropped appellant off on 11th Avenue in Oakland, parked the car somewhere else, and took a cab home.

Later that night, Hunt let appellant into the Bellevue Avenue apartment. Appellant had heroin and cocaine, which he and Hunt went into the living room to use. Hunt asked where Noe was; appellant said more than once that she would not be coming back. Hunt testified that appellant told her he took Noe to the "Stroll," where prostitutes work, and then took her to a golf course near the ocean in San Francisco because Noe wanted to see the ocean. Appellant told Hunt that he had stabbed Noe and that Henderson thought he was beating her up and so came over and "unloaded his gun in her." Appellant said that Noe had screamed his name. Hunt asked appellant why Noe had been killed.

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wearing. He asked Beverly to wipe it off; she noticed dark spots on it. She took the jacket to the cleaners on April 27, as was reflected on the cleaner's receipt.

7. Henderson said he only committed violence and mayhem for money, not personal vendetta, and said, ". . . I did war on people that were just like me. You know, I don't do war on women, old people and kids." Henderson also said that when he was going to do "something" with someone else, he wanted to know everything that was going on. He testified he was upset that appellant involved him in Noe's death and that he thought appellant had conducted himself unprofessionally. Henderson said he disassociated himself from appellant after that.

Appellant referred to his discussion with Noe about setting up Sporty Neal, and said "that if she would set up Sporty, why wouldn't she set up him because he felt she was still seeing Sporty." Hunt said appellant seemed to be in a very excited state; he kept telling her about Noe's death even after Hunt told him she did not want to hear. Appellant left the apartment around 7:00 or 7:30 in the morning.

The next day Hunt told her sister, Padilla, what appellant said about Noe's murder. Later that day, appellant came over and told Padilla that Noe would not be back. He informed her that "if the police showed up, don't tell them anything because she was nothing but a dope [fiend] and they really wouldn't be looking for her." When they were first questioned, neither Padilla nor Hunt told the police what they knew about their roommate's murder. Before the police talked to Beverly, appellant told her to tell them that he had been home most of the day of April 26, which she did. Hunt was to say appellant was at the Bellevue Avenue apartment that night and to have the police think he spent the night there.

In February 1988, appellant was arrested on federal charges with Henry Aldridge. In October of that year, Aldridge's lawyer offered the authorities Aldridge's assistance in the investigation of Noe's death and another homicide. At the time, Aldridge and Padilla had a close relationship. Aldridge told Padilla to talk to the police. She contacted the police in November 1988 and told them she initially had been afraid but now wanted to talk about Noe's death. After appellant received a long federal prison sentence, Padilla told the police everything she knew. The police never guaranteed anything, but Padilla thought her cooperation might benefit Aldridge.[8] Padilla told her sister, Hunt, to talk to the police as well.

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8. Padilla testified at trial that she had not been involved with Aldridge for several years.

Hunt gave the police her statement in March 1989. Beverly and her mother also were friends of Aldridge's. Shortly after Aldridge urged her to tell the truth in February 1989, Beverly gave the police her statement about appellant's and Henderson's actions the night of April 26, 1987.

A couple of months after Hunt gave her March 1989 statement, San Francisco homicide investigators interviewed Henderson in San Diego, where he had relocated. Henderson initially denied knowing anything about Noe's murder. After hearing some details of the killing from the investigators, though, Henderson assumed appellant was talking and trying to shift responsibility onto him. Henderson then told the investigators what he knew about Noe's death. He did not receive a grant of immunity or protection in exchange for his testimony.

An information filed August 8, 1990, charged appellant with murdering Angela Noe in violation of section 187 and alleged that he personally used a deadly weapon, a knife, within the meaning of section 12022, subdivision (b), and that he personally used a firearm within the meaning of section 12022.5. The information further alleged that appellant previously was convicted of two counts of second degree murder, a special circumstance allegation under section 190.2, subdivision (a)(2). Appellant also was alleged to have suffered five prior serious felony convictions within the meaning of sections 667 and 1192.7.[9]

A jury trial began on October 10, 1991. After hearing testimony over six days, the jury could not reach a verdict, and the court declared a mistrial. Before the retrial, the court granted appellant's motion to bifurcate

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9. A second count in the information charged appellant with being a felon in possession of a firearm in violation of section 12021, subdivision (a). That charge was dismissed after appellant's motion raised the statute of limitations.

trial of the special circumstance and prior serious felony conviction allegations. The personal use of a deadly weapon and firearm allegations were stricken as well.

Jury selection commenced on January 25, 1993. The next day the trial court denied appellant's *Wheeler* motion, and the members of the jury and the alternate jurors were sworn. The jury heard testimony over the course of nine days. After deliberating for approximately three hours on February 17, 1993, the jury found appellant guilty of first degree murder.

Appellant waived his right to have the jury try the special circumstances and prior serious felony conviction allegations. The court conducted the trial of those allegations on February 24, 1993. The prosecutor offered in evidence, pursuant to section 969b, certified copies of appellant's prison records. Appellant renewed his constitutional challenge to the prior convictions; prior proceedings denying that challenge were incorporated in the record by stipulation.[10/] The trial court found beyond a reasonable doubt that appellant was convicted on August 7, 1979, of two counts of second degree murder and that the special circumstance asserted under section 190.2, subdivision (a)(2), was true.

On May 14, 1993, the trial court sentenced appellant to state prison for life without possibility of parole. This timely appeal followed.

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10. Before the first trial, appellant moved to strike the two prior murder convictions on constitutional grounds. The court found that both offenses were constitutionally valid.

## DISCUSSION

### *The Wheeler Issue*

Appellant argues the trial court erred in denying his motion to quash the jury panel after the prosecutor's peremptory challenges removed two African-American women from the jury.[11/] The prosecutor's two peremptory challenges left no African-Americans on the jury.[12/] Appellant is African-American and Cuban.

Use of peremptory challenges to remove prospective jurors solely because of presumed group bias based on race violates both the state and federal Constitutions. (*Wheeler, supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89.) At least initially, there is a presumption that the prosecution has exercised its peremptory challenges in a constitutional manner. (*People v. Clair* (1992) 2 Cal.4th 629, 652.) When counsel believes peremptory challenges have excluded jurors solely because of group bias, counsel must raise the point in timely fashion and make a prima facie case of such discrimination. (*People v. Turner* (1994) 8 Cal.4th 137, 164.) To establish a prima facie case, counsel (1) must make as complete a record of the circumstances as is feasible, (2) must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule, and (3) "'" . . . must

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11. Appellant's trial counsel also questioned the prosecutor's use of a peremptory challenge to excuse from the jury a third woman whose ethnic lineage was disputed by the parties. The trial court denied the *Wheeler* challenge to the prosecutor's action because there had not been a prima facie showing that the woman was a member of a cognizable group. On appeal, appellant does not assign this ruling as error.

12. The trial court previously excused for hardship reasons three African-American men.

show a strong likelihood that such persons are being challenged because of their group association.'" [Citations.]" (*Ibid.*, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1154, italics omitted.) Here, the trial court found appellant established a prima facie case; therefore, the trial court had the prosecutor explain the decision to strike those jurors.

After a defendant establishes a prima facie case, the prosecutor has the burden of providing a race-neutral explanation for the peremptory challenges. (*People v. Fuentes* (1991) 54 Cal.3d 707, 714.) The prosecutor's explanation need not be sufficient to justify a challenge for cause. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216.) Jurors may be excused based on hunches or even arbitrary factors, so long as the reasons are not based solely on impermissible group bias. (*People v. Turner, supra*, 8 Cal.4th at p. 165; see *People v. Hall* (1983) 35 Cal.3d 161, 170.) "To rebut a race- or group-bias challenge, counsel need only give a *nondiscriminatory* reason which, under all the circumstances, including logical relevance to the case, appears *genuine* and thus supports the conclusion that race or group prejudice *alone* was not the basis for excusing the juror. [Citations.]" (*People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9, original italics.)

The trial court must make a sincere and reasoned evaluation of the prosecutor's explanation, considering the case's circumstances at the time, the court's knowledge of trial techniques, and the prosecutor's examination of the venire members and use of challenges for cause and peremptory challenges. (*People v. Johnson, supra*, 47 Cal.3d at p. 1216.) The trial court must determine whether the prosecutor's explanation is bona fide or a sham, and a reviewing court must give that determination great deference. (*People v. Turner, supra*, 8 Cal.4th at p. 165, *People v. Johnson, supra*, 47 Cal.3d at p. 1221.) Trial judges plainly are better positioned than appellate courts to evaluate the credibility and

genuineness of reasons given for peremptory challenges. (*People v. Johnson, supra*, 47 Cal.3d at p. 1219, fn. 6 and accompanying text; see *People v. Jackson* (1992) 10 Cal.App.4th 13, 20-21.) If the trial court has made a sincere and reasoned evaluation of the explanations offered, an appellate court will not reassess good faith by conducting its own comparative juror analysis. (*People v. Montiel, supra*, 5 Cal.4th at p. 909.)

The prosecutor's second peremptory challenge excused Ms. Jones-Dulin. During voir-dire, she said she was an affirmative action administrator for San Mateo County who investigated complaints, interviewed witnesses, and made recommendations to county departments. In response to the court's request for an explanation for this peremptory challenge, the prosecutor stated: "The first challenge [of an African-American woman], Ms. Dulin-Jones [*sic*] was a black woman who was reading during the voir dire. She was an affirmative action investigator for the county of San Mateo. What she was reading was *The Autobiography of Malcolm X*. I read it myself, it's an excellent and interesting book, but this case may have racial overtones. I was concerned she would [be] analyzing the case based [on] race, and I was particularly concerned that she seemed more interested in reading than she did to listening to the Court. Under those circumstances I thought it appropriate to excuse her."

The second African-American woman the prosecutor excused was Ms. Jones. During voir dire, Ms. Jones said that she was a medical hematologist working at St. Mary's Hospital. Her duties included emergency room work. She had 3 children whose ages ranged from 20 to 27; her husband was a child welfare worker. She indicated to appellant's counsel during voir dire that if the jury were divided 11 to 1, she would not change her vote just to make a unanimous verdict, that she could argue her position despite the number of people against her.

She had served on a jury that reached a verdict in a murder case about two and a half years earlier. As she recalled, the case involved drugs or prostitution and somebody in the projects; a gun had been used, and the people knew each other. She said the trial took about a month, and the jury deliberated for about four days. When the prosecutor asked if that jury got along fairly well and if it was tough to reach a verdict, Ms. Jones replied: "It was tough. I was the foreman on that jury. It was tough, but we did reach a verdict." As the parties were exercising their peremptory challenges, the prosecutor passed three times while Ms. Jones was seated on the jury. After thirteen more prospective jurors were called and examined on voir dire, and one was excused for cause, the prosecutor exercised a peremptory challenge to excuse Ms. Jones.

After explaining the challenge to Ms. Jones-Dulin, the prosecutor gave the following explanation for excusing Ms. Jones: "The other, Ms. Jones, my second challenge of an African American woman, was more difficult. She seemed a very strong juror. She had been the foreperson of a jury before at some time in the past, and from her description of the jury experience, she had been something of a force in reaching a verdict. [¶] Unfortunately, although I polled the other homicide prosecutors in my office, I couldn't find which way that case had gone. [¶] I would describe her age as perhaps early to mid-50s. The victim in this case is a young white woman whose lifestyle was that of a prostitute. Many of the witnesses in my case are young women who have been involved in prostitution and drugs. [¶] What I feared was that she would be out of sympathy with the victim's lifestyle and the witnesses' lifestyle. And I also felt very strongly that whatever way she went she was not going to be swayed by the other jurors. [¶] I felt if I had left her on -- I passed several times trying to find out which way she had gone on the earlier case. But looking at the

jurors available to me in the back and the other jurors on the panel, I felt like I was taking a chance if I left her there that the whole case might be resolved based on her perception of the thing, and I didn't want to take that chance. I felt there were other jurors who would be more sympathetic to the victim and my witnesses."[13]

In response, appellant's counsel did not question the veracity of the prosecutor's statement that Ms. Jones-Dulin had been reading during voir dire. Instead, counsel commented, "I believe [the prosecutor's] allegations regarding Ms. Jones as opposed to Ms. Jones-Dulin are quite subjective." Counsel expressed the opinion that Ms. Jones's age did not distinguish her from many of the other jurors, and said that ". . . other than the fact that she was a strong African-American woman, there was nothing that distinguished her from any of the other jurors who had previous jury duty."

The trial court then asked the prosecutor to reiterate the reason for challenging Ms. Jones. The prosecutor stated: "From the tenor of her responses and

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13. The prosecutor then offered a similar explanation for the third peremptory challenge questioned by appellant's counsel: "But in any event it was her age and her background, and I felt she might be out of sympathy with the victim's lifestyle. [¶] The Court has heard this case once and knows my witnesses are not classic examples of upstanding citizens, and for that reason she was excused. [¶] It's also interesting to note that counsel has excused two older women from the jury that I would have left on. [¶] [One was a woman] who raised her two nephews after her sister apparently abandoned them. I thought she might have been able to view my victim's life with more sympathy, certainly not condoning it but understanding that people do irresponsible things but don't deserve necessarily to be killed. [¶] The other older woman I would have left is [one] whose family was involved with the police. And I don't blame counsel for letting her go, but those are the sorts of things I have been looking for to counterbalance what I feared might be disapproval for the victim's lifestyle. And based on that I exercised the three challenges that counsel complains of."

her presence. First of all, she was on a jury; she was the foreperson of that jury; she said it was a difficult process. She said the trial lasted, I think she said, a month and deliberateed [*sic*] four days. I felt she was instrumental in reaching that verdict. [¶] I was unable to find out what had happened in that jury. If the woman had been 25 years old or if I [had] known which jury she had sat on, she might well have remained. But she was sufficiently strong in her responses and obviously had been strong in one jury, and because of her age I thought she was disapproving of the lifestyle of the victim or she might be. I may have shot myself in the foot, but the fact is given the other people who were available, I saw no reason to take a chance with her." The trial court stated that it wanted to review the case law overnight and would make a decision in the morning.

At the beginning of the next morning's session, the trial court recapitulated the peremptory challenges exercised by the prosecutor[14] and the prosecutor's reasons for excusing Ms. Jones-Dulin and Ms. Jones. The court then stated: "The law requires that if there is a [cognizable] group that's being excluded in this case it would be Afro-American and in this case female because that's all we're dealing with. And if there's a strong

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14. The trial court said: "Let me set a picture of what this jury looks like at this time. Of the present people in the jury box, 10 of the 12 are men. The 2 remaining jurors who were voir dired but not selected, since no one else was knocked off, are an elderly Asian female . . . and an older white female . . . . [¶] The District Attorney exercised seven challenges in this case, knocking off Mr. Ward as his first challenge, then knocking off Ms. Jones-Dulin, a black female probably in her 40s. Then Mr. Horita, an Asian male, and Ms. Early an older white female, and Ms. Jones, an older black female, and, Mr. Schummel, a [*sic*] older white male, and Ms. Shephard, an older woman of what I would call some mulatto parentage. It's not clear to me whether she's Filipino, Asian, black. It's a little hard to tell on her."

likelihood that the jurors are being excluded based on that, then the Court must demand an explanation by finding a prima facie case, which I've done. [¶] [The prosecutor's] response was to articulate a neutral explanation for striking these particular jurors. . . . The explanation as to Ms. Jones-Dulin regarding the reading during voir dire is probably a sufficient explanation on that one. His concern was that she would not necessarily pay attention in this case. [¶] And with respect to Ms. Jones, this obviously is the more difficult one. Ms. Jones was stricken because she is a forceful person. Given her past experience on a jury and because of her age, she's likely to disapprove of the lifestyle. I think that's what these challenges boil down to. [¶] [The prosecutor] did challenge [another woman] who was also an older female. In fact, three of his four challenge[s] to women, one basis is age. [¶] At this point I cannot find that [the prosecutor] acted in bad faith within the meaning of Wheeler."

Appellant contends that the record shows the prosecutor's actual motivation for excusing Ms. Jones-Dulin was based impermissibly on race. The prosecutor acknowledged two separate bases for challenging Ms. Jones-Dulin: "I was concerned she would [be] analyzing the case based [on] race, and I was particularly concerned that she seemed more interested in reading than she did to listening to the Court." The record reflects no dispute that Ms. Jones-Dulin was in fact reading during voir dire. The trial court found that the prosecutor's second reason was a sufficient, good-faith explanation of the peremptory challenge. Appellant would have us not defer to the trial court's determination and instead read the transcripts as revealing that the prosecutor lacked a genuine, nondiscriminatory reason for excusing Ms. Jones-Dulin. However, having reviewed the whole record of the voir dire, we cannot state that the prosecutor's second reason was inherently implausible or

impossible to believe. (Cf. *People v. Jackson, supra*, 10 Cal.App.4th at p. 21.) Therefore, the trial court's assessment of the prosecutor's credibility is entitled to deference. Consequently, we find the trial court's ruling on the peremptory challenge to Ms. Jones-Dulin was supported by substantial evidence of at least one race-neutral explanation. (See *People v. Turner, supra*, 8 Cal.4th at p. 172; *People v. Jackson, supra*, 10 Cal.App.4th at pp. 20-21.)

Similarly, appellant's argument concerning the peremptory challenge to Ms. Jones isolates and emphasizes the prosecutor's apparently descriptive references to Ms. Jones's race and the victim's race. However, the trial court accepted the prosecutor's explanation that Ms. Jones was a forceful person who seemed to have played a significant role in a murder case verdict before and whose age suggested she might not sympathize with the victim's and witnesses' lifestyle of prostitution and drug use. As the trial court noted, in three of the prosecutor's four peremptory challenges to women, age was one basis of the challenge. Accordingly, we find the trial court's ruling on the peremptory challenge to Ms. Jones was supported by substantial evidence of at least one race-neutral explanation. (See *People v. Turner, supra*, 8 Cal.4th at p. 172; *People v. Jackson, supra*, 10 Cal.App.4th at pp. 20-21.)[15]

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15. On appeal, appellant claims that using peremptory challenges to exclude prospective jurors based on their age itself constitutes an impermissible group bias. We reject the claim because it was not raised in the trial court. (*People v. Howard, supra*, 1 Cal.4th at pp. 1157-1158; *People v. Hayes* (1990) 52 Cal.3d 577, 605.)

**The Prior Bad Acts Evidence**

Appellant argues the trial court erred by allowing evidence of prior bad acts. Before trial, appellant sought to exclude the evidence under Evidence Code sections 1101 and 352;[16] the issues were briefed and argued extensively. As pertinent to this appeal, the evidence related to three areas: (1) the assault on McNeary; (2) appellant's sale of drugs to Noe, Padilla, and Hunt; and (3) appellant's "business" relationship with Henderson involving acts of violence.

Evidence of a person's character in the form of instances of prior conduct is inadmissible to prove a particular instance of the person's conduct. (Evid. Code, § 1101, subd. (a).) However, evidence of prior bad acts can be admissible if relevant to prove a fact other than a disposition to commit the act, such as motive, opportunity, intent, preparation, plan, knowledge, or identity. (Evid. Code, § 1101, subd. (b).) The admissibility of other crimes evidence depends on three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the prior acts evidence to prove or disprove the material fact; and (3) the applicability of any rule or policy requiring the exclusion of relevant evidence, such as Evidence Code section 352.

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16. Evidence Code section 1101 provides, in pertinent part: "(a) . . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶](b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act. [¶](c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

(*People v. Sully* (1991) 53 Cal.3d 1195, 1224; *People v. Douglas* (1990) 50 Cal.3d 468, 510.) If evidence of another offense tends logically, naturally, and by reasonable inference to prove or disprove a material contested issue, then it may be admissible notwithstanding its tendency to prove commission of an unrelated crime. (*People v. Schader* (1969) 71 Cal.2d 761, 774-777; *People v. Peete* (1946) 28 Cal.2d 306, 315; see *People v. Douglas, supra*, 50 Cal.3d at pp. 510-511.)

**The McNeary Incident and Drug Sales**

Appellant objected to evidence of the assault on McNeary, asserting that the evidence was "solely to establish that [appellant] has a propensity to commit violent acts and . . . as such it should be excluded." The prosecutor responded that the McNeary incident and the drug sales were relevant to show why appellant was motivated to kill Noe after hearing the taped conversation between Noe and Neal, McNeary's best friend.[17] The trial court found that the McNeary incident tended to establish that there was "bad blood" between appellant

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17. The prosecutor argued: "[Appellant] was making money off of all three girls . . . . [T]he fact is they were working as prostitutes, and he was ending up with a lot of money . . . . [¶] He finds out that one of the girls is consorting with someone else, a girl that he has been talking with to set up the person with whom she is secretly consorting. He reacts violently. [¶] That is a short recitation of the facts. Sanitizing this is to remove the element of motive from the case. [Appellant] made a lot of money off of these women . . . . When his domination of the women was in jeopardy, he dumped her to leave a message to his rival." The prosecutor later summarized the argument: "My position is very simple. When he finds out that the victim is in contact with Sporty [Neal] secretly, right, and decides she was trying to set him up, that threatens his livelihood from narcotics and his domination of the women he's making money from. [¶] And further in context, it appears that he might be in some physical danger from Sporty."

and McNeary and, because McNeary and Neal were best friends, that appellant bore ill will towards both of them. The court also thought appellant's drug sales to Padilla and Hunt were relevant to show why Neal's call could provoke Noe's murder -- to protect appellant's interest in Padilla and Hunt either because of animosity between appellant and Neal or because of appellant's fear of being set up.

Appellant argues that evidence of the McNeary incident was both tenuous and cumulative on the question of motive. He contends Padilla's testimony that appellant was concerned about the taped call from Neal, and Hunt's testimony that appellant said he killed Noe because he thought Noe and Neal might set him up, were sufficient. However, the assault on McNeary established a plausible basis for appellant to be concerned about retribution by McNeary or McNeary's best friend, Neal.[18] The violence of the McNeary assault helps explain the degree of personal danger appellant apparently perceived in surreptitious communication between Neal and Noe. Thus, evidence of appellant's attack on McNeary was relevant and necessary to show why appellant was motivated to go to the extreme of murdering Noe to prevent her from setting him up for Neal.

Appellant contends that evidence concerning his drug sales to Noe, Padilla, and Hunt did not tend to prove he had a motive to kill Noe, or any other issue actually in dispute. However, appellant's analysis of the issue fails to acknowledge the consequences of the shifting relationships between appellant, the three women, and McNeary and

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18. No other evidence addressed whether appellant had a reason to be concerned that Neal might present a physical threat to him. Padilla's testimony that Noe and appellant talked about setting up Neal did suggest there was some earlier conflict between appellant and Neal. According to Padilla, appellant told Noe that she could set up Neal for him, and he "could get even with him also."

Neal, appellant's rivals for the women's attention and money. Hunt's and Padilla's loyalty to appellant was worth as much as $400 a day in narcotics sales. Just as a plot between Neal and Noe might present a physical threat to appellant, Neal's or McNeary's potential to erode appellant's domination of the women presented a financial threat as well. Noe's murderer used extreme violence to kill her and left her body where it was certain to be found the next day. Appellant made sure Hunt and Padilla thought he had done so because of Noe's contact with Neal. Thus, the evidence leads to the inference that appellant had several motives for Noe's savage murder: removing a perceived immediate physical threat to his safety; sending a warning to Neal, and indirectly to McNeary, that contacts with appellant's women would be dealt with brutally; and reinforcing his domination of Hunt and Padilla. Therefore, the evidence was relevant and necessary to the issue of appellant's motive for murdering Noe, notwithstanding that it also showed appellant sold narcotics.

**Appellant's Relationship with Henderson**

Appellant argues that Henderson's testimony that they "did a few things together" requiring Henderson to be armed and involving acts of violence was not relevant to the issue of premeditation, and even if it was relevant, it was cumulative. Neither contention is persuasive.

The prosecutor offered Henderson's testimony about his prior actions with appellant only for the issue of premeditation. After appellant told Padilla he would "take care of" Noe's telephone call with Neal, appellant called Henderson to drive appellant and Noe to San Francisco. The prosecutor argued this was consistent with premeditation because appellant called in someone he could trust, from prior experience, to be involved in a violent crime without talking about it afterwards. Further,

the prosecutor argued that evidence of appellant's relationship with Henderson was relevant to explain appellant's reason for bringing a potential witness to a murder. Thus, contrary to appellant's argument, evidence of his prior acts with Henderson was offered not to prove that he had a propensity to commit such acts, but rather as evidence of his state of mind in using Henderson to take Noe to San Francisco that night. Appellant's prior acts with Henderson established a reasonable inference that appellant had a basis for confidence in Henderson's reliability in criminal endeavors. As a result, appellant's decision to involve Henderson supported a reasonable inference that appellant planned to kill Noe even though he brought a witness to a potential capital offense. The evidence that appellant "did a few things" with Henderson therefore was relevant to the issue of premeditation.

Appellant suggests that the prior acts evidence was cumulative because other evidence established that he knew of Henderson's criminal activities. However, appellant is only half right in observing that the inference of premeditation did not depend on the nature of his acts, but on his understanding of Henderson's prior acts. Contrary to appellant's claim, his knowledge that Henderson was a hired killer, because Henderson told him of the failed contract on his life, gave him little reason to believe he could trust Henderson as a witness to a murder he was about to commit. The evidence of his relationship with Henderson not only was relevant to show he knew of Henderson's prior acts, but also was necessary to show that he had a basis for trusting Henderson. The evidence was admissible.

**Evidence Code Section 352**

Appellant contends the trial court erred by not making an explicit determination on the record as to whether the risk of undue prejudice from the prior acts evidence substantially outweighed the evidence's probative value.[19] Appellant asserts the record reflects that the trial court only assessed the evidence's relevance and failed to perform the weighing process contemplated by Evidence Code section 352. The contentions are not persuasive.

As we noted above, the issues concerning the admissibility of the prior acts evidence were briefed and argued extensively prior to trial. Indeed, most of the debate involved whether the evidence tended to prove something other than appellant's propensity for criminal acts. Appellant raised the Evidence Code section 352 objection and presented the trial court with his perception of the relative balance between undue prejudice and probative value. The prosecution responded that the evidence was admissible notwithstanding appellant's challenge under Evidence Code section 352. During the hearing on the motion to exclude the evidence, appellant's counsel argued that the prejudicial effect of the drug sales evidence outweighed its probative value. Counsel concluded appellant's argument at the hearing with a request that the trial court exercise its discretion. In ruling that the evidence was admissible, the trial court's comments reflected a recognition of the evidence's potential for undue prejudice. The court cautioned the

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19. Evidence Code section 352 allows the trial court discretion to exclude evidence ". . . if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, subd. (b).)

prosecutor against attempting to develop these matters in great detail.[20]

When a defendant objects to evidence pursuant to Evidence Code section 352, the record must demonstrate affirmatively that the trial court did in fact weigh prejudice against probative value. (*People v. Clair, supra*, 2 Cal.4th at p. 660.) Nevertheless, the trial court need not expressly weigh prejudice or even expressly state that it has done so. (*People v. Crittenden* (1994) 9 Cal.4th 83, 135; *People v. Clair, supra*, 2 Cal.4th at p. 660; *People v. Mickey* (1991) 54 Cal.3d 612, 656.) The record is sufficient if it shows that the trial court understood and undertook its obligation to perform the weighing function prescribed by Evidence Code section 352. (*People v. Triplett* (1993) 16 Cal.App.4th 624, 628-629; cf. *People v. Montiel* (1985) 39 Cal.3d 910, 924.)

Here the record shows that the trial court performed its obligations under Evidence Code section 352. The briefs and arguments of counsel apprised the trial court of the issue of prejudice and the court's discretion in ruling. The trial court commented on the relevance and probative value of the prior acts evidence.

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20. After recounting the issues and the prosecutor's theories on the evidence's relevance and probative value, the court found that the McNeary incident and drug sales were relevant to the issue of motive. The court then said, "This evidence has a tendency to show this over and above any propensity, and for that reason I think it's admissible. [¶] Again, I think it's appropriate to minimize this activity especially between [appellant] and Ms. Padilla. I mean they had a business relationship which involved change of money, and the reason I don't think it needs to be gone into in any great detail is because these are really open to some peripheral objection." The court found that appellant's prior activities with Henderson were relevant to the issue of premeditation and to explain Henderson's willingness to testify against appellant: "So it will be relevant on those two issues as well. So Mr. Henderson's testimony, I think, in terms of this illegal activity again need not be gone into in great detail."

However, the court's comments also implicitly acknowledged the potential for undue prejudice and reflected that the court evaluated that potential in ruling on the motion. No more is required under the case law. (See *People v. Crittenden, supra*, 9 Cal.4th at pp. 135-136; *People v. Sully, supra*, 53 Cal.3d at p. 1225.)

We review the trial court's ruling for abuse of discretion. (*People v. Clair, supra*, 2 Cal.4th at p. 660; *People v. Mickey, supra*, 54 Cal.3d at pp. 655-656.) The trial court's exercise of its discretion will not be disturbed on appeal unless the prejudicial effect of the evidence clearly outweighs its probative value. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 134.) In this context, prejudicial evidence is that which uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value to the issues. (*People v. Garceau* (1993) 6 Cal.4th 140, 178.)

The probative value of the prior acts evidence on the critical issues of motive and premeditation was not substantially outweighed by a risk of undue prejudice. Moreover, the risk that the jury would rely upon that evidence for an improper purpose was minimized by the trial court's decision to give the jury a limiting instruction. That instruction told the jury that such evidence could not be considered to show that appellant was a person of bad character or that he had a disposition to commit crimes. Therefore, we conclude that the trial court did not err in admitting the prior acts evidence. (See *People* v. *Crittenden, supra*, 9 Cal.4th at pp. 134-135; *People v. Garceau, supra*, 6 Cal.4th at pp. 178-179, 194-195.)[21]

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21. Appellant asserts on appeal that introduction of the evidence violated his right to due process under the Fourteenth Amendment of the United States Constitution. However, he has not referred us to a place in the trial record, and we have not found one, where he objected to this evidence based on any federal constitutional provision. Therefore, the claim is waived. (See *People v. Crittenden,*

**The Prosecutorial Misconduct Claim**

Appellant contends the trial court twice erred by not granting his mistrial motions based on alleged prosecutorial misconduct. In each instance the trial court gave the jury an admonishment that appellant contends was insufficient to cure the claimed harm.

A motion for a mistrial is addressed to the sound discretion of the trial court. (*People* v. *Eckstrom* (1986) 187 Cal.App.3d 323, 330; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 548.) The trial court may properly deny the motion when the court is satisfied that no injustice has resulted or will result from the complained-of occurrences. (*People v. Eckstrom, supra*, 187 Cal.App.3d at p. 330; *People v. Guillebeau, supra*, 107 Cal.App.3d at p. 548.) A motion for a mistrial necessarily presupposes that the effect of the objectionable matter is so prejudicial as to be incurable by striking it and admonishing the jury to disregard it. (*People v. Eckstrom, supra*, 187 Cal.App.3d at p. 330; *People v. Guillebeau, supra*, 107 Cal.App.3d at pp. 547-548.) "A trial court's decision that an error or impropriety can be cured by admonition will not be reversed unless exceptional circumstances make it improbable that the jury obeyed the admonition. [Citations.]" (*People v. Gould* (1960) 54 Cal.2d 621, 628.)

Appellant's first motion for a mistrial resulted from Henderson's testimony on redirect examination. As we noted earlier, the trial court found that appellant's prior activities with Henderson were relevant to the issue of premeditation. The court cautioned, though, ". . . Mr. Henderson's testimony, I think, in terms of this illegal activity again need not be gone into in great detail." On

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*supra*, 9 Cal.4th at p. 135, fn. 10.) Even if the claim had been made in the trial court, our conclusion that the evidence properly was admitted in evidence would preclude a finding of federal constitutional error. (*Ibid.*)

direct examination, the prosecutor elicited that Henderson and appellant went into business together and "did a few things" that required Henderson to be armed and that sometime involved violent acts.[22] Henderson's direct testimony plainly suggested that his "business" included murder for hire.

On cross-examination, appellant's counsel suggested that Henderson participated in the McNeary incident as a favor and not because of a business relationship. Henderson also acknowledged he never saw appellant kill anybody, and they never were engaged in a business relationship where appellant was paid to kill someone. Appellant's counsel then continued, "Q. So, when [the prosecutor] asks you about this business relationship, [appellant] wasn't in the same business as you at all, isn't that right, as far as you know? [¶]A. Well, as far as seeing with my own eyes? [¶]Q. That's right. [¶]A. No."

During redirect examination, the prosecutor referred back to this portion of the cross-examination and asked Henderson, "[Q.]: Didn't you testify that [appellant] was in the same business that you were? [¶][A]. Yeah. [¶]Q. Tell the jury how you know? [¶]A. He'd tell it to anybody that would listen. [¶]Q. In fact, he used to brag about the things that he did? [¶]A. Right. [¶]Q. In fact, he used to brag about killing people, isn't that correct? [¶]A. Right. [¶]Q. And, in fact, he used to brag about people who would testify against him? [¶]A. Never to me. [¶]Q. Okay. And he'd brag about the various violent acts he performed? [¶]A. True. [¶]Q. Was there

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22. The prosecutor's direct examination on these matters was relatively brief. "Q. Did you go into business with [appellant] at that time? [¶] A. Well, we did a few things together. [¶] Q. Now, were those things that involved acts of violence? [¶] A. Sometimes. [¶] Q. And did they require you to be armed with a firearm? [¶] A. Yes."

anything about the use of the drug cocaine that in your opinion seemed to cause [appellant] to brag about that sort of thing? [¶]A. Yeah. Yeah. [¶]Q. And in your presence when he used cocaine, would he sort of boast about his proudness [*sic*]? [¶]A. Yes. [¶]Q. And that was his proudness [*sic*] as a gunman and a murderer, is that correct? [¶][APPELLANT'S COUNSEL]: Objection. Leading. Misstates the record. [¶]THE COURT: Sustained. Sustained. [¶][THE PROSECUTOR]: Would he brag about acts of violence that he would perform? [¶][A.] Yes. [¶]Q. And did he do that when other people were present? [¶]A. Anybody that would listen."

Appellant's counsel then immediately continued this line of questioning on recross-examination: "[Q.] You didn't see him commit any violent acts that he bragged about, did you? [¶][A.] How do you mean, murder or what, just mayhem? [¶]Q. I mean whatever you thought [the prosecutor] just meant a moment ago. [¶]A. I've seen him commit violent acts, yes. [¶]Q. Did he brag about it? [¶]A. Sure. [¶]Q. He bragged about tying up Kevin McNeary? [¶]A. Sure. [¶]Q. That didn't bother you, did it? [¶]A. No. None of it bothered me. [¶]Q. That was business, right? [¶]A. None of it bothered me. [¶]Q. You never saw [appellant] kill anybody, did you? [¶]A. No, not with my eyes."

Appellant's counsel quickly finished Henderson's recross-examination and, after brief further redirect examination, Henderson was excused for the day, and court recessed for lunch. Once the jurors left the courtroom, appellant's counsel moved for a mistrial based on the testimony that appellant bragged about other murders. The court listened to extensive argument from both counsel. The trial court noted that cross-examination raised the question of whether Henderson believed he and appellant were in the same business, but that the answer to the question had almost no relevance. The court concluded that the subsequent testimony's probative value

for rehabilitating Henderson was outweighed by its prejudice and confusion of the issues. The court therefore determined that the testimony would be stricken under Evidence Code section 352. The trial court denied the motion for a mistrial, but stated that appellant was entitled to an instruction, if his counsel wanted one, that the testimony had been stricken and was not relevant. Appellant's counsel asked the trial court to admonish the jury. The court and counsel discussed at length an appropriate admonition.

When court resumed, the trial court instructed the jury: "At this point, ladies and gentlemen, before the People call their next witness, the questions concerning the source of Mr. Henderson's belief that [appellant] and he were in the same business have been stricken in this case and that includes any references to any bragging that may have been done. Because it has been stricken you are to disregard it and not consider it for any purpose." Just prior to closing arguments, the trial court's instructions to the jury reiterated the point: "Do not consider for any purpose any offer of evidence that was rejected nor any evidence that was stricken by the court. Treat it as though you had never heard of it. [¶] You must decide all questions of fact in this case from the evidence received in this trial and not from any other source."

Appellant contends that these admonitions were inadequate to protect his right to a fair trial. We disagree. Contrary to appellant's repeated assertions, the trial court did not find the prosecutor committed misconduct during the redirect examination of Henderson. Indeed, appellant's counsel did not predicate the mistrial motion on prosecutorial misconduct. Instead, counsel asked the court to find that the evidence that appellant bragged about other killings was not relevant to any issue in the case. Notwithstanding the tardiness of this relevancy objection, the trial court said that whether Henderson and

appellant were in the same "business" was relevant only to explain why appellant took Henderson with him; therefore, Henderson's beliefs about their business had only marginal relevance. Consequently, the trial court struck the evidence concerning why Henderson believed he and appellant were in the same business as being more prejudicial than probative. The trial court left in the record the testimony that Henderson never saw appellant kill anyone.

We also find that the trial court's admonitions to the jury were adequate to avert any undue prejudice from Henderson's statements. (Cf. *People v. Visciotti* (1992) 2 Cal.4th 1, 53-54, *People v. Manson* (1976) 61 Cal.App.3d 102, 146.) The record does not display such exceptional circumstances as to suggest the jury was unlikely to obey those admonitions. (See *People v. Gould, supra*, 54 Cal.2d at p. 628.)

Appellant's second mistrial motion was based on a claim of prosecutorial misconduct during closing argument. Appellant's counsel did not immediately object to the prosecutor's allegedly improper argument. When counsel did object that the argument was not supported by evidence in the record, the trial court gave the jury an appropriate admonishment. The following morning, appellant's counsel asserted that the prosecutor's argument warranted a mistrial.

In general, a prosecutor commits misconduct by using deceptive or reprehensible methods to persuade either the court or the jury. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Whether or not the prosecutor acted in good faith is not crucial to the inquiry because the challenged conduct is evaluated against an objective standard. (*Ibid.*) When the claim is the prosecutor committed misconduct through comments before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*Ibid.*; *People v.*

*Clair, supra*, 2 Cal.4th at pp. 662-663.) In assessing the effect of comments by the court and prosecutor on the jury, "[w]e presume that jurors treat the court's instructions as a statement of law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair, supra*, 2 Cal.4th at p. 663, fn. 8.)

When deciding if an argument to the jury constituted misconduct, we must also keep in mind the latitude afforded the prosecutor. "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) Prosecutors may fully state their views as to what the evidence shows and may urge whatever conclusions they deem proper. (*Ibid.*) "Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. [Citations.] The prosecutor may not, however, argue facts or inferences not based on the evidence presented. [Citation.]" (*Ibid.*; see *People v. Visciotti, supra*, 2 Cal.4th at p. 54, fn. 21.)

We have reviewed the prosecutor's closing argument, including the portion to which appellant objected, with the foregoing rules in mind.[23] Although

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23. The record reflects that appellant's objection occurred in the following context towards the end of the prosecutor's closing argument: "[THE PROSECUTOR:] . . . Counsel wants to talk about the motive for the case. A telling comment from Evelyn Padilla. Killed someone over a phone call. How do we know he killed somebody over a phone call? Because he told Jeanne [Hunt] that that was the motive. I didn't make that up. You heard it on the tape. That's what [appellant] says is the motive and then counsel presses Evelyn Padilla. Why would you kill somebody? You don't know any motive. And what does Evelyn Padilla say? She says; you have to know [appellant]. You have to know [appellant] to understand why he would do something like that, not Fred Henderson because this is not a Fred Henderson sort of killing. We have a body.

appellant asserts that the prosecutor was attempting to reinject Henderson's stricken testimony about appellant's bragging, we do not believe it reasonably likely that the jury construed the argument in that fashion. The

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We have evidence. It's committed in public. It is messy. It is savage. It [*sic*] just nasty. And who would do it? The kind of guy that would do this killing is the kind of guy who, according to Jeanne [Hunt], likes it. That's what you got to understand about this case. He likes it. He likes to do it. He likes to talk about it. He really does. You know, you expect horns and a tail on people who are like that, but they look like everybody else. They look like that and they sit there and they listen to the evidence against them and then counsel argues this is so--how could anybody do that? Well, Jesus, I don't know. I'm not a psychiatrist, but I can tell you that the evidence in this case from Jeanne [Hunt], from the coroner and from [appellant's] own mouth establish that he can and he did. Fred Henderson would not have talked about this case. He told you that himself. He wouldn't have done it in this way. He wouldn't have talked about it afterwards. He is not the source of the information from Jeanne [Hunt]. Even if he had seen her that night, which he did not, there's only one person in that room with her and that's [appellant], and the details that she is able to supply about this killing could only come from one place and that place is sitting over there, and the motive to give out those details does not belong to Fred Henderson. Fred Henderson ain't talking about this case. Who would commit a murder like this and talk about it? Only one person and he's sitting over there.

"[APPELLANT'S COUNSEL]: Judge, I am going to object. There is no evidence of that in the record. There's no evidence about [appellant's] character in that regard.

"THE COURT: All right. There is none.

"[THE PROSECUTOR]: I was suggesting, Your Honor, that-

"[APPELLANT'S COUNSEL]: I ask the jury be admonished to disregard the remark. Your Honor. It's not based on the evidence in this case.

"THE COURT: All right. [¶] Ladies and gentlemen, any remarks that are based on counsels [*sic*] argument is not evidence. The evidence you have received already and you will accord any comments made the appropriate way if not based on any evidence which is nothing."

prosecutor plainly referred to Hunt's testimony that appellant seemed excited when he kept telling her about the murder though she told him she did not want to hear. Considered in context, the prosecutor's comments constituted proper argument of the facts and inferences based on the evidence presented. (See *People* v. *Visciotti, supra*, 2 Cal.4th at p. 54, fn. 21; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1052.) Moreover, the trial court's comments and admonition minimized any risk of undue prejudice to appellant. We find no basis for concluding that the prosecutor committed misconduct. We find the trial court did not abuse its discretion in denying appellant's motions for a mistrial.

**The Prior Murder Convictions**

Appellant contends that the trial court erred by denying his motion to strike his prior murder convictions. On August 7, 1979, appellant had pleaded guilty to two counts of second degree murder. In challenging the constitutional validity of those pleas, appellant submitted a declaration that stated: "Neither the court nor my lawyer in that case explained to me, nor was I aware, that in order to be proven guilty of second degree murder at trial, the state would have had to prove that I unlawfully caused the death of another person with express or implied malice aforethought. If I had known that malice aforethought was a necessary element of second degree murder, I would not have pleaded guilty to second degree murder in either case."

A defendant may challenge the constitutional validity of a prior murder conviction alleged as a prior-murder special circumstance by a pretrial motion to strike the special circumstance allegation. (*Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1296.) The prior conviction is presumptively valid. (*Id.* at p. 1303.) On a collateral challenge to the validity of a prior murder

conviction, the defendant bears the burden of proving its constitutional invalidity by a preponderance of the evidence.[24] (*Id*, at pp. 1305, 1307.) We will uphold the trial court's determination if it is supported by substantial evidence. (*People* v. *Anderson* (1991) 1 Cal.App.4th 318, 322; see *People v. Pride* (1992) 3 Cal.4th 195, 256.)

Following *Boykin v. Alabama* (1969) 395 U.S. 238, 244, our Supreme Court held that when the trial court accepts a guilty plea, ". . . the record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination. . . ." (*In re Tahl* (1969) 1 Cal.3d 122, 132, original italics.) The accused must also be advised of the nature of the charge and the consequences of the plea. (*Ibid.*) However, the last two advisements are required by judicially declared rule rather than being constitutionally compelled. (*In re Ronald E.* (1977) 19 Cal.3d 315, 320-321; see *U.S. v. Newman* (9th Cir. 1990) 912 F.2d 1119, 1124, fn. 6 and accompanying text.) The validity of a guilty plea is established by a record that affirmatively shows that the plea was voluntary and intelligent under the totality of the circumstances. (*People v. Howard, supra*, 1 Cal.4th at p. 1175.) However, an involuntary plea may result where the defendant "has such an incomplete understanding of the charge that [the] plea cannot stand as an intelligent admission of guilt." (*Henderson v. Morgan* (1976) 426 U.S. 637, 645, fn. 13.)

The trial court had before it "WAIVER ON PLEA OF GUILTY" forms initialed and signed by appellant and his counsel for both murder pleas. On the forms, appellant acknowledged that he understood and

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24. We reject appellant's challenge to the allocation of the burden of proof required by *Curl v. Superior Court, supra*, 51 Cal.3d at pages 1303-1307. We are obliged to accept the law declared by our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

waived specific, enumerated rights.[25] His attorney's signature on the forms acknowledged: "I am attorney of record and I have explained each of the above rights to the defendant, and having explored the facts with him/her, studied his/her possible defenses to the charges and the possible consequences of a plea of guilty, and I concur in his/her decision to waive the above rights and to enter a plea of guilty."

The forms appellant signed were identical except as to the second paragraph. There one said: "I understand that I am charged with the offense(s) of MURDER & USE OF A FIREARM 187, 12022.5 (JERRY TYSON) (PLEA IS TO SECOND DEGREE MURDER -- MIDDLE TERM OF SIX YEARS) a felony offense(s)[.]" The other form appellant signed said: I understand that I am charged with the offense(s) of MURDER, USE OF A FIREARM & 3 PRIORS (187, 12022.5) (RICHARD T. JONES) (PLEA IS TO SECOND DEGREE MURDER -- MIDDLE TERM OF SIX YEARS) a felony offense(s)[.]"

Both forms acknowledged: "I have discussed the charge(s), the facts and the possible defenses with my attorney. [¶] . . . I offer my plea of 'Guilty' freely and voluntarily and of my own accord and with full understanding of all matters set forth in the Information (Indictment) and in this waiver. [¶] . . . I understand each and every one of the rights outlined above and I hereby waive and give up each of them in order to enter my

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25. Appellant acknowledged that he understood and waived: the right to a speedy and public trial by jury; the right to be confronted by the witnesses against him and to have his attorney cross-examine them; the right to testify on his behalf, and the right not to be compelled to testify if he chose to remain silent. Appellant also acknowledged that he had absolute rights to the assistance of a lawyer and to the processes of the court to compel attendance of witnesses on his behalf.

guilty plea(s). I am entering a plea of guilty because I am in fact guilty."

The trial court also had before it the transcript of the hearing on appellant's pleas. During the hearing on his murder pleas, his counsel read the negotiated plea agreement for the record. The agreement recited that appellant had been charged with three murders and numerous other felonies in five cases. Under the terms of the agreement, appellant pleaded guilty only to two counts of second degree murder, one count of selling heroin, and one count of possessing stolen property, with the total term of state imprisonment fixed at ten years. Before taking appellant's plea, the court had appellant verify that he read the waiver forms, understood them, and initialed and signed them. Appellant also personally stated on the record that he gave up his constitutional rights to a jury trial, to confront and cross-examine the witnesses against him in open court, and to remain silent and not be required to incriminate himself. Appellant also personally acknowledged that his attorney was correct in stating there was a factual basis for each of the pleas.

The trial court was not obliged to credit appellant's claim that if he had known that malice aforethought was an element of second degree murder, he would not have pleaded guilty to either murder. (See *People v. Webb* (1993) 6 Cal.4th 494, 531-532.) The totality of the circumstances contained in the record showed that appellant's prior guilty pleas to second degree murder were voluntary and intelligent. (Cf. *People v. Howard, supra*, I Cal.4th at p. 1175; *Curl v. Superior Court, supra*, 51 Cal.3d at pp. 1304-1305.) Substantial evidence therefore supports the trial court's decision to uphold the constitutional validity of the prior convictions.

**DISPOSITION**

The judgment is affirmed.

Chin, P.J.

We concur:

Merrill, J.

Corrigan, J.